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COUNTY OF MARIN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SEAPLANE ADVENTURES, LLC, a California
Limited Liability Company

Plaintiff,

v.

COUNTY OF MARIN, CALIFORNIA; AND
DOES 1 THROUGH 10, Inclusive,

Defendant.

Case No.: 20-cv-06222-WHA

**[PROPOSED] ORDER GRANTING
DEFENDANT COUNTY OF MARIN'S
MOTION FOR SUMMARY JUDGMENT**

Complaint filed: September 2, 2020

Date: October 7, 2021
Time: 8:00 AM
Judge: Honorable William Alsup
Dept: Courtroom 12, 19th Floor

Defendant COUNTY OF MARIN's Motion for Summary Judgment came on for regular hearing on October 7, 2021, at 8:00 a.m. in Courtroom 12 of the above-entitled court.

Brandon W. Halter, Esq. appeared on behalf of defendant COUNTY OF MARIN ("County"). John E. Sharp appeared on behalf of plaintiff SEAPLANE ADVENTURES, LLC ("Plaintiff"). The Court, having reviewed and considered all relevant information, documents and evidence in this matter, and the papers submitted in support of an in opposition to said motion, and having heard oral argument in support of and in opposition to said motion, makes the following findings.

Beginning in early 2020, the COVID-19 pandemic affected nearly every aspect of life in the United States. To minimize the death and destruction from COVID-19, governments at every level

1 instituted measures to curb transmission. For its part, defendant County of Marin (at the direction of its
2 Public Health Officer, Dr. Matthew Willis) instituted a series of emergency health orders, industry-
3 specific guidance, and other measures. These efforts were based on the most up-to-date scientific
4 evidence possible, as well as the judgment of public health experts like Dr. Willis. The scientific
5 evidence and expert analysis showed that one of the most common ways in which COVID-19 is
6 transmitted is through close contact with an infected individual. In addition, the probability of infection
7 increases with the proximity and duration of the contact, and also increases if the contact occurs indoors.
8 Further, the evidence showed that a significant percentage of the people infected by COVID-19 were
9 asymptomatic (and as a result could be unaware that they carry the virus), but could still potentially
10 transmit the disease to others.

11 The first sets of public health orders issued by County as well as state and federal authorities
12 beginning in March 2020 significantly restricted community activity, due to the need to combat what
13 was at that time a potentially catastrophic increase in the transmission of COVID-19. As transmission
14 rates and other factors related to the threat of COVID-19 changed over next few months, however,
15 County (like other governments) revised the terms of its health orders. County's revisions, through Dr.
16 Willis, were issued pursuant to a careful evaluation of the best way to balance the restrictions on
17 individuals and businesses in the community that were still necessary to mitigate the threat of COVID-
18 19 against the need to allow for individuals and businesses to return to normal activities as soon as
19 practicable. As a result, restrictions were revised on an industry-by-industry basis, depending on the
20 characteristics of each industry as they related to the factors relevant to COVID-19 transmission, such as
21 how that industry's activity would affect the volume of community activity (i.e., the number of people
22 leaving their homes and traveling), contact intensity (i.e., the type and duration of contacts between
23 people), and the number of contacts (i.e., the number of people in contact with one another), as well as
24 the degree to which mitigation measures could decrease the risk of community transmission for that
25 industry.

26 Plaintiff operates an air travel business, including seaplane tours and charter flights. In June
27 2020, County received reports that Plaintiff was operating in violation of the health orders. In response,
28 County informed Plaintiff that pursuant to the health orders in effect at that time, its operations related to

1 essential travel were permissible, but its operations related to indoor recreation (i.e., sightseeing tours)
2 and/or recreational travel (i.e., recreational charter flights) were not. Under protest, Plaintiff ceased all
3 its operations in July and August 2020, and brought this lawsuit. Now, Plaintiff's sole pending claim
4 ¹ is that County violated Plaintiff's constitutional right to equal protection, based on two different
5 theories: (1) that County intentionally enforced its health orders more strictly against Plaintiff than it did
6 against other recreational air travel businesses that were classified the same way under the health orders;
7 and (2) that County had no rational basis to classify Plaintiff's operations any differently than businesses
8 in other industries, such as charter boats. But there is no evidence to support either claim.

9 **First**, there is no evidence that County enforced the health orders against Plaintiff any differently
10 than it did against other "similarly-situated" businesses. To "be considered similarly-situated, the class
11 of one challenger and his comparators must be prima facie identical in all relevant respects or directly
12 comparable in all material respects." *Warkentine v. Soria*, 152 F. Supp. 3d 1269, 1294 (E.D. Cal. 2016)
13 (*quoting U.S. v. Moore*, 543 F.3d 891, 896 (7th Cir. 2008)). Here, the only other businesses that could
14 be considered "prima facie identical" to Plaintiff are those that were classified the same way under the
15 health orders. In other words, businesses that provided the same type of indoor recreation and/or
16 recreational travel operations as Plaintiff, and that similarly did not fall within some other exception to
17 the restrictions in the health orders.

18 Plaintiff has identified several other air travel businesses that it believes meet this requirement.
19 However, with respect to all but two of these businesses (i.e., Plaintiff and SF Helicopters), there is no
20 evidence that they provided any recreational flights (as compared with flights for essential travel) at all
21 during the period at issue. As a result, they are not similarly-situated to Plaintiff. Moreover, even if any
22 of these businesses could be considered similarly-situated, there is no evidence that County enforced the
23 health orders any differently against any of them. Instead, the evidence shows that with respect to each
24 business, including Plaintiff, County's process with respect to the health orders followed the same
25 process. First, County publicized the orders and conducted community outreach to maximize the chance
26 that all businesses would be informed of their terms. Second, County relied on all individuals and

27 ¹ The Court dismissed all of Plaintiff's other claims at the motion to dismiss stage, except for Plaintiff's preemption claim,
28 regarding which claim County's motion to dismiss remains pending.

1 businesses in the community to comply in good faith with the terms of the orders—which the vast
2 majority did. Third, County responded to reports of potential health order violations by contacting the
3 individual or business involved, explaining the terms of the health orders as applied to that business, and
4 following up as necessary to ensure compliance. And, though Plaintiff claimed in the FAC that County
5 took a stricter approach with Plaintiff, there is no evidence to support Plaintiff’s claim. In fact, County
6 received reports of potential health order violations by three separate recreational air travel companies—
7 Plaintiff, Skydive Golden Gate, and SF Helicopters—and responded to each company the same way:
8 i.e., make contact, provide information about the terms of the health orders, and follow up as necessary
9 to ensure compliance. There is simply no evidence to support Plaintiff’s allegations that County allowed
10 other similarly-situated businesses to operate freely, but “shut down” Plaintiff.

11 ***Second***, there is no evidence that businesses in other industries were “similarly-situated” to
12 Plaintiff, and even if there was such evidence, County’s decision to treat these other industries
13 differently under the health orders had a rational basis. As discussed, County’s restrictions on Plaintiff
14 were based on the fact that its operations were considered under the health orders as either indoor
15 recreation (i.e., sightseeing flights) or non-essential travel (recreational charter flights). But the other
16 industries to which Plaintiff compares itself—e.g., charter boats, kayak rentals, indoor retail, etc.—were
17 classified separately under the terms of the orders, and subject to different restrictions. As a result, they
18 were not similarly-situated to Plaintiff. Moreover, even if they were, each of these industries also
19 involves a different type of operation than Plaintiff, with a different risk profile from the perspective of
20 limiting transmission of COVID-19. County’s decision to treat these industries differently, which was
21 based on an evaluation of the unique attributes of each industry as they relate to COVID-19 transmission
22 according to scientific evidence and expert analysis, is supported by far more evidence than necessary to
23 satisfy the rational basis standard that applies to Plaintiff’s claim.

24 In summary, there is no genuine dispute as to any fact material to Plaintiff’s equal protection
25 claim. The Court therefore GRANTS County’s motion for summary judgement and HEREBY
26 ORDERS that summary judgment be entered in County’s favor, and against Plaintiff, as to Plaintiff’s
27 equal protection claim.

1 IT IS ORDERED:

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3 DATED: _____

4 Honorable William Alsup
5 United States District Court Judge
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